In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 51

CITY OF FRESNO,
Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS,

THE DELANO-EARLIMART, EXETER, IVANHOE, LINDMORE, LINDSAY-STRATHMORE, LOWER TULE RIVER, MADERA, ORANGE COVE, PORTERVILLE, SAUCELITO, STONE CORRAL, TERRA BELLA and TULARE IRRIGATION DISTRICTS; and THE SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT

DENVER C. PECKINPAH,
1229 N Street, Fresno, California,

ADOLPH MOSKOVITZ,
926 J Street, Sacramento, California,
Attorneys for Respondent, Madera Irrigation District.

MADDOX & ABERCROMBIE;
JAMES K. ABERCROMBIE,
410 Bank of America Building, Visalia, California,
Attorneys for Respondents, Delano-Earlimart, Exeter, Ivanhoe, Lindmore, Lindsay-Strathmore, Lower Tule River, Orange Cove, Porterville, Saucelito, Stone Corral, Terra Bella; and Tulare Irrigation Districts.

IRL DAVIS BRETT,
J. O. REAVIS,
2361 Fliintridge Oaks Drive, Pasadena, California,
Attorneys for Respondent, Southern San Joaquin Municipal Utility District.

Subject Index

Table of Authorities Cited

Other Authorities

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 51

CITY OF FRESNO,
Petitioner,
vs.
STATE OF CALIFORNIA, UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS,

THE DELANO-EARLIMART, EXETER, IVANHOE, LINDMORE, LINDSAY-STRATHMORE, LOWER TULE RIVER, MADERA, ORANGE COVE, PORTERVILLE, SAUCELITO, STONE CORRAL, TERRA BELLA and TULARE IRRIGATION DISTRICTS; and THE SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT

STATUTES INVOLVED

1. Section 9 of the Reclamation Project Act of 1939, 53 Stat. 1195, 43 U.S.C. § 485(h):

(a) "No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefor, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on—

"(1) the engineering feasibility of the proposed construction;

"(2) the estimated cost of the proposed construction;

"(3) the part of the estimated cost which can properly be allocated to irrigation and probably be repaid by the water users;

"(4) the part of the estimated cost which can properly be allocated to power and probably be returned to the United States in net power revenues;

"(5) the part of the estimated cost which can properly be allocated to municipal water supply or other miscellaneous purposes and probably be returned to the United States.

"If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal the total estimated cost of construction as determined by the Secretary, then the new project, new division of a project, or supplemental works on a project, covered by his

findings, shall be deemed authorized and may be undertaken by the Secretary. . . ."

* * *

(c) "The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ percentum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 percentum per

annum, and such other fixed charges as the Secretary deems proper: *Provided further,* That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. *No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.*" Emphasis added.[1]

2. Reclamation Act of June 17, 1902, § 7, 32 Stat. 389, 43 U.S.C. § 421:

"That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation

[1]We reprint §9(c) of the Reclamation Project Act of 1939 because, although the City of Fresno included it as a statute involved, Fresno Br. App. 14, the City deleted the very important last sentence. The significance of this sentence is discussed in Part II of the Argument herein.

under judicial process, and to pay from the reclamation funds the sums which may be needed for that purpose. . . ."

STATEMENT OF THE CASE

The City of Fresno is a plaintiff in intervention in the main action, which is described in the briefs for the petitioners in No. 31, pp. 9-14, and No. 115, pp. 13-23. The City filed its motion for leave to intervene on January 4, 1952, 1R. 182-23, shortly before the trial on the merits began. The district court allowed the intervention on May 8, 1953. 1R. 196.

Fresno based its intervention on the assertion "that representation of City of Fresno by existing parties may be inadequate," 1R. 182-9, *i.e.*, it was not satisfied to be represented as a member of the class which the original plaintiffs claimed to represent, cf. 7R. 375-76, 293 F. 2d at 348.[2] It alleged that the defendant federal officials were illegally diverting the San Joaquin River at Friant for use on lands within the defend-

---

[2]Fresno now says that it is one of the named plaintiffs and represents the members of the class. Fresno Br. 47. This statement is not correct. In its complaint in intervention Fresno did not seek to represent a class. The City's complaint contains no allegation of class representation such as that which was added by amendment to the original complaint. 1R. 79-82. When Fresno amended its complaint to attempt to allege a cause of action against the United States, it distinguished the "plaintiffs and the class they represent" from itself. 2R. 517-18. The district court similarly distinguished among the plaintiffs, the members of the class, and Fresno, *e.g.* 3R. 942, found separately as to each, and decreed that the City's right to service from Friant was "subject to the rights, as herein declared, of the plaintiffs and their class." 3R. 10-17.

ant districts, causing the City both present and future damage, 1R. 182-7 to 182-8, because the City needed the "full" or "entire natural flow . . . down the natural channel" or alternatively the plaintiffs' physical solution to supply percolating water through the alluvial cone of the river to the City's wells, 1R. 182-4 to 182-6. Fresno also claimed that its rights had not been and could not be taken by eminent domain. 1R. 182-13. Later, Fresno was allowed to amend its complaint to attempt to state a cause of action against the United States. The essence of this cause of action was that there was a controversy between the City and the United States as to whether the actions of the individual defendants were "legal or illegal, lawful or unlawful," and as to the amount of water the City was entitled to divert. 2R. 514-16.[3]

The district court held that either the full natural flow of the river or the plaintiffs' plan of physical solution was necessary to satisfy Fresno's rights, 3R. 951, 928; that the safe yield of Fresno's wells was 30,000 acre-feet per year, and that the City was exceeding the safe yield by pumping 45,000 acre-feet per year, 3R. 951; and decreed that the defendants, *i.e.*, the United States, its officials, and the districts, had

---

[3]Fresno also attempted to state a cause of action based on applications it had filed to appropriate surface water from the river. 1R. 182-14 to 182-21. The district court held that the City had no vested rights enforceable under these applications. 3R. 1018-19. The City did not appeal. The State Water Rights Board later denied the City's applications, but the City did not seek judicial review. Fresno Br. 4-5, 123-24, 147-48. Thus, despite the repeated references to the proceedings on these applications in Fresno's brief, it would seem that this cause of action need no longer be considered. See generally, Annot. 1 L. Ed. 2d 1820 (1957).

no right to divert "water out of the watershed . . . until [the] supplemental water requirements of [the] City of Fresno are met, at the rate per acre foot then charged for what is now known as Class 1 water for irrigation purposes," 3R. 1017-18.

The Court of Appeals reversed the decree "insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam." 293 F. 2d at 353, 360, 7R. 383, 394. In all other respects the Court of Appeals treated Fresno's case as it did the case of the plaintiffs generally, *i.e.*, dismissed it as to the United States, held that the City's rights were subject to taking either by judicial process or physical seizure, but held that the City's rights had not been taken.

The district court had held that Fresno had two types of rights: (1) its vested rights as an overlying owner;[1] and (2) a right to preferential treatment in-

---

[1] In California rights to pump ground water, like rights to divert surface water, are of three types, overlying or riparian, appropriative and prescriptive. The overlying right is a right of a landowner to take a correlative share of the water for reasonable beneficial uses on his overlying land. "The right is based on ownership of land and is appurtenant thereto." The appropriative right is a right based on priority of use to export surplus water to nonoverlying land. Surplus water is that not needed for the reasonable beneficial use of the overlying owners. The prescriptive right is a right of use based on the open and uninterrupted taking of nonsurplus water for the prescriptive period of five years under a claim of right. *Pasadena v. Alhambra*, 33 Cal. 2d 908, 925-27 (1949); *cf.* 293 F. 2d 343-44, 7R. 368.

A city exercises overlying rights only to the extent that it pumps for uses on overlying lands which it owns, such as parks; it is an appropriator or prescriptor to the extent that it pumps water for use by its inhabitants on their lands. *San Bernardino v. Riverside*, 186 Cal. 7, 24-26 (1921). Since Fresno pumps its water into a common distribution system for use throughout the

contracting with the United States. 293 F. 2d at 351-53; 7R. 381-83. The City's argument, in its simplest form, now is:

1. That its rights, of whatever nature, cannot be taken by the United States, *i.e.*, that the Court of Appeals erred when it held:

> "While a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights." 293 F. 2d at 354, 7R. 383; and

2. That the United States may be enjoined from delivering water outside of Fresno and Madera Counties until it makes water available to Fresno as needed for its domestic and municipal purposes in excess of 30,000 acre feet a year, the safe yield of its wells, at a price not to exceed $3.50 per acre foot. 3R. 956-57, 1016-18, 1R. 56, par. 13(a).

SUMMARY OF ARGUMENT

The Central Valley Project is, in part, a means of redeveloping water rights so that water can be

---

city, 3R. 1205-07, does not limit its pumping to uses on its own land or to land overlying the basin, and has been exceeding the safe yield of the basin, *i.e.*, pumping nonsurplus waters, 3R. 951, it has to some extent become an appropriator or prescriptor. That extent was not defined in the decree. *Cf.* 3R. 1003-05. Of course, such definition of the extent of rights of each type is necessary in an adjudication *inter sese*, *Pasadena v. Alhambra*, *supra*, 33 Cal. 2d at 919, but the district court held that this proceeding was not one seeking such an adjudication. 142 F. Supp. 36, 7R. 27; 293 F. 2d at 348, 7R. 375.

redistributed in accordance with the greatest public good. As part of the process of redevelopment, the United States has authority to control and divert the San Joaquin River and to acquire all water rights, including those of the City of Fresno, which are impaired by such control and diversion.

The history of the project, beginning with the earliest plans, and continuing through executive, judicial and congressional examination of the execution of these plans, all show, without exception, that the United States is authorized to acquire all the water rights of whatever description that are necessary for project purposes. Neither the state statutes relative to preferential treatment of various areas and uses, nor the waiver of immunity to suit in § 208 of the Department of Justice Appropriation Act, 1953, limit the authority to acquire water rights. The state statutes are irrelevant. The federal statutes are specific and controlling.

The United States also has authority to sell water to the City and has undertaken to do so. Despite the City's rather flippant argument that one cannot drink damages, there is nothing to show that the United States will do anything but improve the City's water supply. The City's complaint is that it cannot buy as much water as it desires for the price it wishes to pay. Under the controlling federal law, the City has no right to the preferential treatment it demands. To the contrary, irrigation is the primary purpose of federal reclamation projects and contracts to furnish water for municipal and miscellaneous purposes

may be made only if the irrigation efficiency of the project is not impaired.

The present action is not a general adjudication, *inter sese*, defining the rights of all claimants against each other. Section 208 of the Justice Department Appropriation Act, 1953, waived immunity of the United States to suit only in such general adjudications, and therefore the Court of Appeals properly dismissed the United States as a party. Since the districts' only connection with this suit is as contractors with the United States and the United States cannot properly be made a party, the City of Fresno has no right to relief against the districts.

ARGUMENT

I. THE HISTORY OF THE PLANNING AND EXECUTION OF THE CENTRAL VALLEY PROJECT SHOWS THAT THE STATUTORY AUTHORITY TO ACQUIRE WATER RIGHTS IS NOT LIMITED AS CONTENDED BY THE CITY OF FRESNO.

Fresno argues that Congress has not authorized acquisition of its rights. The City claims that the authority to acquire water rights for purposes of the Central Valley Project is limited: (1) to those necessary to provide supplemental rather than new water supplies, Fresno Br. 31, 42; (2) to the taking of "waste" water or water used to irrigate uncontrolled grassland, *id.*, 49-50; (3) by various preferences given by state law to municipal uses and to areas of origin, *id.*, 54-57, 137-53. Although these arguments were persuasive to the district court, they were rejected by the Court of Appeals. 293 F. 2d at 353-54, 7R. 384-85.

The relevant statutes are § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 421, p. 4, herein, and § 2 of the Rivers and Harbors Act of 1937, 50 Stat. 850, Fresno Br. App. 12-14. As the Court of Appeals said, "The statutes expressly grant power to acquire such rights as may be required." 293 F. 2d at 354; 7R. 384. Fresno's argument that the statutes do not mean what they say is based on an ambiguous fragment of legislative history. Specifically, the City relies on extracts from the Feasibility Report of December 2, 1935, submitted by the Secretary of the Interior to the President:[5] "The Central Valley project embodies a plan . . . to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys. . . ." Fresno Br., 43, App. 21; and "The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of a high type." *Id.*, 42 App. 26.

A. The Feasibility Report of 1935 Does Not Support the City's Contentions.

The Feasibility Report does not, however, support Fresno's conclusions that the character or amount of water rights which can be taken for project purposes or the uses to which they may be put are lim-

[5]The Feasibility Report is reprinted in 90 F. Supp. at 823-27, in 1 Engle, Central Valley Project Documents, H. Doc. No. 416, 84th Cong., 2d Sess. 562-67 (1956), and in Appendix D of the city's brief, Fresno Br. App. 20-28. References herein are to that appendix.

ited. In the first place, the report itself contradicts the City's argument. It states:

> "This water [imported from the Sacramento to Mendota] will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir . . . and to be utilized in the southern San Joaquin Valley where local supplies are deficient." Fresno Br. App. 22.

This shows that all existing uses were not to be left absolutely unimpaired, that some might be curtailed to aid others, and that the entire flow might be taken to the southern San Joaquin Valley where it was needed.

Further the report stated:

> "Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land." Fresno Br. App. 26.[6]

This statement shows that no representation was made to Congress that the project could be operated

---

[6]The city contended below that the use of the word *purchase* in this statement precluded resort to eminent domain. 293 F. 2d 354, 7R. 384. In the present context, where the power of eminent domain has been granted by statute, *purchase* is properly construed to cover condemnation. *Hanson Co. v. United States*, 261 U.S. 581, 585-86 (1923); *People v. Superior Court*, 10 Cal. 2d 288, 294-95, 73 P.2d 1221 (1937).

only with surplus or unappropriated water or that the water was to be used only on lands already irrigated.[7]

B. The State's Planning of the Project Shows That No Rights Were to Be Immune From Taking.

But the Feasibility Report is at best a general, minimum statement. 142 F. Supp. at 95, 7R. 121. It is neither necessary nor desirable to rely only on its exegesis to prove that the statutes mean what they say. Actually, the whole history of the project from its first conception shows that the power of eminent domain was to be used to redevelop the waters of the river in accordance with public benefits. *Cf. Berman v. Parker,* 348 U.S. 26, 33 (1954).[8]

---

[7]Contrary to the City's contentions, Fresno Br. 42-43, it was contemplated that the project would be expanded to serve lands not used at the time of its re-authorization. "It is a great enterprise. Today, it contemplates merely the savings of land which is already in a high state of productivity. In the future, when the demands of that day require it, 10 or 15, 20 or 30 years from now the plan may be extended to include lands which are unused today, but that is only remotely within the contemplation of those who are pleading for this project." 81 Cong. Rec. 6704-05 (1937). (Remarks of Congressman Gearhart on H.R. 7051 which became § 2 of the Rivers and Harbors Act of 1937, the first congressional reauthorization of the project.) The project was expanded to include new lands. H. Doc. No. 146, 80th Cong. 1st Sess. (1947), reproduced in 1 Engle, Central Valley Project Documents, H.R. Doc. No. 416, 84th Cong. 2d Sess. 586, 594 (1956).

[8]The use of the power of eminent domain to redevelop water rights in this reach of the San Joaquin area was recommended at least as early as fifty years ago.

> "The Conservation Commission is of the opinion that the State of California could well afford to condemn and, if necessary, pay for riparian rights . . . . The result . . . would be the creation of a vast amount of new wealth and greater prosperity for millions of present and future California citizens." Cal. Conservation Commission Report, 30-31 (1912), reprinted 3 Appendix to Journals of Cal. Senate &

As the City points out, Fresno Br. 36-37, the Central Valley Project was conceived by the State as a state undertaking and was authorized as a federal project because the State was financially unable to execute the plan. The state plan, before federal authorization and reauthorization, demonstrates that Friant Dam was expressly designed by the State and was thereafter constructed by the United States with a view to the time "when *all* the San Joaquin River water would be diverted at high elevations for exportation to the upper San Joaquin Valley," and "the *entire* regulated supply obtained therefrom would be conveyed through the Madera and San Joaquin River-Kern County canals to the areas of deficient local supply on the east side of the upper San Joaquin Valley." Calif. Div. Water Resources, Bulletin No. 29, San Joaquin River Basin, 259, 328 (1931), Ex. Pffs. 86, Ex. Cal. G. Emphasis added. The parallelism between the language in the state report and the federal feasibility report is a striking indication that the state plan is part of the background of interpretation of the federal statutes. See also Fresno Br. App. 29-30.

The above quotations from Bulletin 29 are not idle remarks lifted by chance from an extensive record. They are fully documented and their plain meaning is fortified by other statements, particularly the history

---

Assembly, 40th Session (1913). "[R]eservoir sites are reported to exist near Friant . . . . Unless such storage is undertaken by the controlling riparian owners, under the present conditions the legal difficulties will probably be greater than the engineering ones." *Id.* 211.

of the proposed Friant powerplant and the history of the construction of the project.

The original plans called for a powerplant at Friant to be operated by the water allowed to pass through the dam to meet the needs of the crop lands above the mouth of the Merced River. It was assumed that the construction of what is now the Delta-Mendota Canal would be deferred. Cal. Div. Water Resources, Bulletin No. 25, State Water Plan, 44-45 (1930), Ex. Cal. F. But this was only an interim arrangement, for the waters used to meet the requirements of the crop lands above the mouth of the Merced River were ultimately to be taken for project purposes, as appears from the following. *Id.*, 46-47; see also note to the second table on 49:

> "The cost of the Friant reservoir unit includes $1,500,000 for a 30,000 kilovolt ampere power plant at the dam. This plant would be operated with waters allowed to pass the dam to meet the 'crop land' rights. *It is assumed that at the end of a ten-year period these waters would be diverted for use in the upper San Joaquin Valley and therefore be unavailable for the generation of power in the plant.*" Emphasis added.

When the exchange of Sacramento water for San Joaquin water at Mendota could be accomplished, *i.e.*, after the building of what is now the Delta-Mendota Canal, it was planned that:

> "[P]ractically the entire flow of the San Joaquin River would be regulated in Friant Reservoir and would be made available for diversion to and utilization in the upper San Joaquin Valley."

Cal. Div. Water Resources, Bulletin No. 29, San Joaquin Basin, 431 (1931), Ex. Pffs. 86, Ex. Cal. G.

So the matter stood in 1930 and 1931. It is obvious that there were to be wholesale diversions at Friant and little, if any, water passing through the dam.

In 1934 the State applied for a grant from the Federal Public Works Administration to build the project. 90 F.Supp. at 790. The State's application was not granted, but the information therein is of interest to show what there was before the United States to describe the project. This information faithfully repeats what was described above.[9]

---

[9] *Amounts and Characteristics of Electric Energy Outputs From Friant Power Plant.*

"In the operation of Friant reservoir, prior to the bringing in of the San Joaquin River pumping system [to bring Sacramento River water to Mendota], it was assumed that the first demand upon the flow of the San Joaquin River would be the supply for the 'Crop Lands' now served from the San Joaquin River in the lower San Joaquin Valley above the mouth of the Merced River in accord with the delivery schedule now in operation. The period studied was the 42-year period 1889-1931. The Friant power plant of 30,000 kilovolt amperes capacity is located at the lower toe of Friant dam for utilizing these 'Crop Land' waters. *This plant is to be abandoned upon completion of the San Joaquin River pumping system, or at such time that practically all the San Joaquin River water would be diverted by the Friant-Kern and Madera canals for exportation to the upper San Joaquin Valley.*" California Water Project Authority Amended Application to Federal Emergency Administration of Public Works for Approval of Central Valley Project of California and for Grant and Loan for its Construction . . . (Jan 25, 1934) 109. Emphasis added.

"When the San Joaquin River Pumping System is constructed and put into operation, practically the entire flow of the San Joaquin River passing Friant will be regulated in and diverted at Friant Reservoir". *Id.* at 125.

C. Judicial Consideration of the Project Shows That No Rights Were to Be Immune From Taking.

The Court of Claims in *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1 (1948), considered in detail the acquisition of water rights for the project. It found no limitation on the authority to acquire:

> "32. Prior to December 2, 1935 [the day the President approved the Feasibility Report], the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern, in the State of California.
>
> "Such plan contemplated, among other things, the construction of a dam across the San Joaquin River at Friant, forming a reservoir. It contemplated the construction of two canals, one with a capacity of 1,000 cubic feet per second, referred to later as the Madera Canal, reaching north from the reservoir to the counties of Madera and Merced, and another, with a capacity of 3,500 cubic feet per second, referred to later as the Friant-Kern Canal, reaching south from the reservoir to the counties of Fresno, Tulare, Kings, and Kern. Except for occasional spills to provide reserve storage capacity for the purpose of flood control, the reservoir and canals were planned with capacity to store and divert substantially all the water customarily flowing in the San Joaquin River at Friant. The plan contemplated that *the United States would acquire all existing rights* to the use, diversion, and storage of the waters of the San

Joaquin River flowing at Friant." 111 Ct. Cls. at 27. Emphasis added.

"35. Defendant's plan, as modified, contemplated that the United States should eventually store and divert to nonriparian use *all the waters of the San Joaquin River flowing at Friant,* except for occasional spills. Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control. Such spilling would not provide an adequate or dependable substitute for the spring floods in the irrigation of riparian noncontrolled grasslands.

"The plan contemplated that defendant should acquire all existing rights to the use of the water flowing past Friant. Such rights were of three classes: (1) Use of the water for production of cultivated crops; (2) use of the water for irrigation of controlled grasslands; and (3) the riparian right to the flow of the river, subject to prior rights for the above purposes, for the irrigation of riparian uncontrolled grasslands, watering of livestock, and domestic purposes.

"Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plant contemplated that sufficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights.

> "The plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished." 111 Ct. Cls. at 31. Emphasis added.

These holdings were accepted and summarized by this Court:

> "A more dramatic feature of the plan is the water storage and irrigation system at the other end of the valley. There the waters of the San Joaquin will be arrested at Friant, where they would take leave of the mountains, and will be diverted north and south through a system of canals and sold to irrigate more than a million acres of land, some as far as 160 miles away. A cost of refreshing this great expanse of semiarid land is that, except for occasional spills, only a dry river bed will cross the plain below the dam. Here, however, surplus waters from the north are utilized, for through a 150-mile canal Sacramento water is to be pumped to the cultivated lands formerly dependent on the San Joaquin." *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 729 (1950).

Obviously, the drying up of the river would not have resulted in compensable takings if the takings were unauthorized by law. *Hooe v. United States,* 218 U.S. 322, 335 (1910); *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682, 703 n. 27 (1949). Equally obvious is the fact that since the Delta-Mendota Canal empties at Mendota, many miles downstream from Friant, there is a reach where substitution of Sacramento water is impossible. It follows that there are

areas where absolute deprivation is authorized, although administratively the Secretary has found it unnecessary to exercise his authority to such an extent.

D. Congressional Consideration of the Project Shows That No Rights Were to Be Immune From Taking

The United States is in the course of executing the ultimate plan of the Central Valley Project.[10] The acquisition of water rights for this purpose has been repeatedly reported to Congress and approved by it.

The Feasibility Report of 1935 stated:

> "One and one-half million acre-feet annually on the average will be available for the transmission from the [Friant] reservoir through the means of the San Joaquin Pumping System *and the purchase of water rights in the San Joaquin River.*" 90 F.Supp. at 825. Emphasis added.

In 1947 in a second report, Allocation of Costs and Feasibility Report, H. Doc. No. 146, 80th Cong., 1st Sess. (1947), reproduced in I Engle, Central Valley

---

[10]The original state plan distinguished sharply between the initial development, which could have been supported by the 601,000 acre-feet estimated to be annually available from surplus water and "grass land" rights, Cal. Div. Water Resources, Bulletin 25, State Water Plan 163-64 (1930), Ex. Cal. F, and the 1,720,000 acre-feet necessary for full development, *Id.* 99. Under the ultimate plan, the water necessary to meet "crop land" rights was also to be diverted. *Id.* 45, 46-47. The initial proposal to defer construction of the San Joaquin River pumping system, *id.* 45, now the Delta-Mendota Canal, was soon abandoned. Rivers and Harbors Committee Doc. No. 35, 73d Cong. 2d Sess. 7, 8 (1934), 1 Engle, Central Valley Project Documents, H. Doc. 416, 84th Cong. 2d Sess. 551-52, 553 (1956). Thus, the ultimate development was begun with the inception of the project and it never passed through a relatively static initial phase.

Project Documents (1956), H. Doc. No. 416, 84th Cong., 2d Sess. 574, the Secretary advised Congress that the total cost of the Central Valley Project according to the latest available estimates (as of January 31, 1946) included $8,457,500 for "water rights and miscellaneous," 1 Engle at 588, par. 14; and that "More than three-fifths of this total represents the cost of acquiring certain water rights (particularly along the San Joaquin River) . . .", *id.* at 590, par. 15(m).

Between 1939 and 1949 in submitting its budget requests the Bureau of Reclamation regularly advised Congress that it was purchasing water rights in the San Joaquin River. The hearings and reports are listed in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735 n. 9 (1950).

On at least three occasions Congress was advised of the interference by the project with vested water rights between Friant and Mendota and of the program of the Department of the Interior to pay damages for such interference. The first occasion was in 1948 in testimony on the Interior Department Appropriation Bill, 1949, by Mr. Boke, then the regional director of the Bureau of Reclamation in Sacramento and one of the original defendants in this case:

"WATER RIGHTS

"The next item is 'Water rights, $332,000.' Tell us about it.

"Mr. Boke. The water rights story in the Central Valley is quite an interesting one and divides into two major phases. One phase is that on the

San Joaquin River where the general story is that through our operation, under our set-up, we are depriving or we are alleged to be depriving in some cases, water users in that area, of their water. The reverse is true on the Sacramento River where we operate Shasta Dam where, instead of our depriving other people of their water, as a water-right problem, the water-right problem is that some of the 280 diverters along the river are taking water which belongs to the United States.

"This item of $332,000 would be used for both purposes. *Part of that $332,000 would be used to settle the remaining outstanding claims that we have along the San Joaquin River, in an area known as the Friant to Gravelly Ford area. There are about, I believe, 226 users in that area, and we have settled with about 212 of them.*

"*We have certain payments to make for those water users whose use of the water we have damaged, or are damaging through the operation of the Friant Reservoir and the diversion of the San Joaquin River water down the Friant-Kern canal and out through the Madera canal. Some of this money will be used in settling those cases.*

"In addition, we have some 37 suits against us, I believe as a total, in the San Joaquin Valley. A large part of our water-right work, our legal work, and a good deal of technical investigation work also is involved in the protection of the Government in handling those cases." Hearings, Part 3, Subcomm. of the House Comm. on Appropriations. Interior Dept., 80th Cong. 2d Sess., 1279-80 (1948).

The $323,000 for water rights was part of the total request for "Irrigation Facilities, Friant." Hearings, *supra,* 1213-15. The total budget estimate for Irrigation Facilities, i.e., for both Friant and the Delta, was $32,154,000. The House reduced this to $30,080,000, H.R. Rep. No. 2038, 80th Cong. 2d Sess. 24 (1948), with the statement:

> "The bill includes a total of $40,000,400 for this project, which is $7,185,600 less than the budget estimate. The Committee has set forth in the bill the specific projects for which funds are to be provided.
>
> "The drought which large areas in California have experienced this past winter reemphasizes the necessity for expediting the construction of the irrigation facilities of the C.V.P. To this end the committee has made liberal appropriations for storage and irrigation facilities . . . ". *Id.* at 27-28.

Although the amount was reduced, no indication has been found that the money which was appropriated was not to be used for the purposes explained at the hearings. On the other hand, in dealing with the request for power facilities the permissible uses were meticulously discussed, *id.* at 28, and limitations were thereafter incorporated in the Interior Department Appropriation Act, 1949, 62 Stat. 1129.

The Senate simply reduced by 10% the total requested for the Central Valley Project. S. Rep. No. 1609, 80th Cong. 2d Sess., 6, 21 (1948). In conference, a compromise was reached. H.R. Rep. No. 2398, 80th Cong. 2d Sess. 11, 25 (1948). Again, although

the use of the appropriation for power facilities was limited, the appropriation for irrigation facilities, including water rights, was not.

The second occasion when Congress was informed of the water right problem below Friant was in 1949. In the report on the Central Valley Basin, S. Doc. No. 113, 81st Cong., 1st Sess. (1949), Ex. Pffs. 136, the Secretary advised Congress:

> "A portion of the water to be stored by Friant Dam and diverted into the Madera and Friant-Kern canals will be available by reason of the purchase of water rights pertaining to certain 'grasslands' which were irrigated from canals and overflows of San Joaquin River during high stages. Since these grasslands are generally of very poor quality, they produce only small yields of low-value crops. By purchase of the water rights, in accordance with State law, the water formerly used on these low-value lands will be made available for diversion to highly productive lands under the Friant-Kern and Madera canals. Practically all of the grassland rights have been purchased. *However, there are a number of other water-right owners along San Joaquin River below Friant Dam which will be affected by the regulation of the river. Investigations of these individual rights and the settlement of justifiable claims for damage due to proposed operation of Millerton Lake are now in progress.*" *Id.* at 213. Emphasis added.

The third occasion when Congress was advised about the program of the Department of the Interior for settling the water right problems between Friant

and Gravelly Ford was in 2 Engle, Central Valley Project Documents, H. Doc. No. 246, 85th Cong. 1st Sess. 616 (1957):

> "FRIANT-TO-GRAVELLY FORD CONTRACTS
>
> "In the 37-mile reach of the San Joaquin River immediately below Friant Dam and extending to a point below the Gravelly Ford Canal, there are approximately 230 small land holdings with varying requirements of irrigation. Negotiations were conducted with this group of land owners for more than a decade, resulting in 99 water rights adjustment contracts and 17 supplemental contracts. Some of these provide for the construction by Reclamation of minor irrigation facilities, some for the performance of river channel work, and some for cash payments to the land owners. The total amount of water represented is relatively small compared to that involved in the Miller & Lux and other principal contracts. The Friant-to-Gravelly Ford Contracts are tabulated herein on page 618. Several cases went to litigation in the action known as *Rank v. Krug*, which is reported in Chapter XIX, p. 734."

Congress has continued to make appropriations for construction of the Central Valley Project without limitation on how the funds might be used for water rights. 2 Engle, Central Valley Project Documents, H.R. Doc. No. 246, 85th Cong. 1st Sess. 2-3 (1957). This, of course, is a ratification of the administrative construction that water rights between Friant and Mendota can be taken. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 293-94 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739-40 (1950).

II. THE SECRETARY OF THE INTERIOR HAS ACTED WITHIN HIS STATUTORY DISCRETION IN DETERMINING THE AMOUNTS AND PRICE OF WATER TO BE FURNISHED TO THE CITY OF FRESNO FROM FRIANT DAM UNDER CONTRACT WITH THE UNITED STATES.

The City of Fresno argues that it has a preferential right to receive a total of at least 100,000 acre feet of water a year from Friant Dam at a price no greater than that charged for Class 1 irrigation, i.e., a maximum of $3.50 per acre foot. Fresno Br. 86, 89. It presently has a contract for 60,000 acre feet a year at the standard municipal rate of $10.00 per acre foot. Fresno Br. 86; Fresno Pet. for Cert. 38, 7R. 304. The district court held that the City was entitled to such preferential treatment and water rate to satisfy all its needs in excess of the safe yield of its wells. 142 F. Supp. at 184-85, 7R. 270-71; 3R. 956-57, 1016-18.[11] The Court of Appeals reversed this aspect of the district court's judgment, 293 F. 2d at 351-53, 7R. 380-383.

The position of the City of Fresno seems to be based on the theory first, that by virtue of § 8 of the Reclamation Act of 1902, Fresno Br. App. 6, the Secretary of the Interior, in delivering water from the Central Valley Project, must comply with Cali-

[11] The district court actually established 3 categories of priority or preferences in contracting for project water: (1) First priority was given to the named plaintiffs, the members of the class which the named plaintiffs purport to represent, the Tranquillity Irrigation District, the City of Fresno, and all inhabitants and property owners within those areas; (2) Second priority was given to the Chowchilla Water District, and the Madera Irrigation District and all inhabitants and property owners wthin those areas; and (3) Third priority was given to all other areas as to any water not required for the first two categories. 3R. 1015-16.

fornia statutes relating to preferential rights of counties and watersheds of origin and to the pre-eminence of domestic above other uses; and second, that these California statutes put the City of Fresno in a preferred position to contract for project water supplies. The City is wrong on both counts.

As to § 8 of the Reclamation Act of 1902, this Court has made it clear that § 8 does not require compliance with state law in the operation of federal reclamation projects. In *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 291-292 (1958) this Court held:

> "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska v. Wyoming, supra*, at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.' Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that '[n]o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner. . . .' We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State."

In the instant case, by § 9(c) of the Reclamation Project Act of 1939, p. 3 herein, Congress has provided a system of regulation respecting contracts and

rates for municipal water supply. Two points about § 9(c) are significant.

First, the last sentence expressly makes use of water for municipal water supply subordinate to irrigation use: "No contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." Under federal law, therefore, the City of Fresno not only does not have a preferential right to contract for a project water supply, it may only receive water if in the Secretary's judgment irrigation use will not be adversely affected.

Second, § 9(c) delegates broad authority and discretion to the Secretary of the Interior to fix the rates for municipal water service. The rates are to be such "as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper. . . ." The Secretary has exercised this discretion and, pursuant to § 9(a) of the Reclamation Project Act of 1939, p. 2 herein, he notified Congress of the results in the Allocation of Costs and Feasibility Report of February 24, 1947. H. Doc. No. 146, 80th Cong. 1st Sess. (1947). 1 Engle, Central Valley Project Documents (1956), H. Doc. No. 416, 84th Cong., 2nd Sess., 574.

The report assumed a rate of $10 per acre foot for municipal water, as contrasted with rates in the neighborhood of $3 per acre foot or less for irrigation

water. *Id.* at 594-96. The report pointed out that the irrigation water rates were based on the farm benefits of the water and the estimated ability of the irrigators to pay over a protracted period. Further it was estimated that during the selected repayment period the revenues from irrigation water would return only $58,545,475 out of the $221,551,600 of project capital cost allocated to irrigation. *Id.* at 576-77, 597. By contrast, the report estimated that during the same period the higher municipal water rates would return $29,667,932 as against the $9,091,800 of project capital cost allocated to municipal water supply. *Ibid.* The surplus revenues from municipal water supply would be used, together with similar surplus revenues from the sale of project electric energy, to return the portion of the project costs allocated to irrigation but beyond the ability of irrigators to pay. *Id.* at 596, 598.

Since 1947, Congress has, therefore, known that water for municipal use would be sold at higher rates than for irrigation use; that municipal water rates were expected to return a great deal more than the portion of the project cost allocated to municipal water supply; and that these surplus revenues would be applied against the irrigation costs which could not be recovered from the irrigators. Congress has also been informed that this program has been carried out. 2 Engle, Central Valley Project Documents, H. Doc. No. 246, 85th Cong., 1st Sess. 79-84, 261-262 (1957). Long term contracts for irrigation service from Friant Dam provide for rates of $3.50 per acre foot for Class 1 water and $1.50 per acre foot for Class 2

water, and contracts for municipal water supply from Friant charge $10.00 per acre foot. *Id.* 84-101, 272-80.[12] With this knowledge of the manner in which the Secretary has exercised his discretion in fixing water rates, Congress has continued year after year up to the present date to appropriate funds for the Central Valley Project. If there were any doubt as to the legality of the Secretary's rate fixing action, these appropriations constitute clear ratification of his administrative conduct. *Ivanhoe Irr. Dist. v. McCracken,* 257 U.S. 275, 293 (1958); *Fleming v. Mohawk,* 331 U.S. 111, 119 (1947).[13]

Accordingly, federal law alone governs this situation, and under the controlling federal law the City of Fresno can insist neither upon preferential satisfaction of its water needs from the Central Valley Project nor upon the same rate as irrigators.

---

[12]The City of Fresno argues that the municipal water rates have been miscalculated and will result in the United States making a forbidden profit. Fresno Br. 105-15. We do not recall that this argument has ever been made before in this litigation. Certainly, there is no finding by the district court to support it. The district court's objection to the higher municipal water rate was simply that it was unreasonable to charge cities more than farmers. 3R. 957, 1017-18. The district court agreed with the City that it is entitled to a price described by plaintiffs' witness Smith as "cheaper than your needles and pins." 4R. 1492.

[13]The City of Fresno relies upon section 4 of the Act of April 16, 1906, Fresno Br. App. 7, as an indication of Congressional intent that cities should pay no more for water than farmers. Fresno Br. 43-44, 109-10. Aside from the fact that section 9(c) of the Reclamation Project Act of 1939 probably controls, a simple reading of the 1906 statute reveals that even it does not support the City's position. The 1906 statute plainly placed a floor, not a ceiling, on water rates to cities. The statute was concerned only that such "charges shall *not be less* nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken." Emphasis added.

Even if the California county and watershed of origin statutes and the statute denoting domestic use as the highest use of water were relevant, they do not give the City of Fresno the preference it asserts in contracting for water from Friant.

By its own coverage, the county of origin statute, California Water Code § 10505, Fresno Br. App. 34, is completely inapplicable to this situation.[14] Under the watershed of origin statute, California Water Code §§ 11460-11463, Fresno Br. App. 36, the area of preference is stated as being ". . . a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied water therefrom. . . ." California Water Code § 11460. The entire area of service from Friant Dam, including Kern and Tulare Counties, and not merely Fresno and Madera Counties, is within the watershed

---

[14]California Water Code section 10505 provides that there shall be no assignment or release from priority of an application to appropriate unappropriated water filed by the State that will, in the judgment of the state official or agency making the assignment or release, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county. The only applications filed by the State to appropriate San Joaquin River water were assigned to the United States on September 30, 1939, by the State Department of Finance, with the statement that:

> "[S]aid assignment, in the form and substance hereinafter made of the aforesaid applications will not, in the judgment of the State Department of Finance, deprive any county in which such water originates, of any such water necessary for the development of such county. . . ." 1R. 110.

In any event, the county of origin statute coould affect only unappropriated water covered by state applications to appropriate assigned to the United States and could not affect water rights acquired by the United States for project purposes by other means, such as purchase, exchange, or the exercise of the power of eminent domain.

of the San Joaquin River.[15] The statute does not give the portion of the watershed which may be closest to the stream a priority over portions which may be more remote from the stream. Moreover, the preference extends beyond the watershed to areas immediately adjacent thereto which can conveniently be supplied therefrom, a description which seems to cover the entire territory served by the Friant-Kern and Madera Canals.

California Water Code §106, Fresno Br. App. 32, declares that the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation. This section has never been construed by the California courts in the context of delivery of developed water supplies, and there is no indication that it was intended to restrict the United States in distributing water from Reclamation proj-

---

[15]The district court's opinion which was expressly made part of the findings of fact, 3R. 862, stated:

> "Buena Vista Lake is the sink for the Kern River, and Tulare Lake is the sink for all others, including the San Joaquin in flood time, except the Fresno and Chowchilla rivers, whose contributions of water are minor. In times of extreme flood, the Buena Vista Lake empties north across the floor of the valley to Tulare Lake, and when that reaches a sufficient height, the water flows across the low ridge in the vicinity of Mendota and joins the San Joaquin at the place where it turns in the vicinity of Mendota to flow north after flowing westerly." 142 F. Supp. at 44, 7R. 34.

These are well known facts substantiated by state and federal engineering reports. Cal. State Engineers Report, Part IV, 34 (1880); Cal. Conservation Comm. Report 202 (1912), reprinted 3 Appendix to Journals of Cal. Senate & Assembly, 40th Sess. (1913); Rivers and Harbors Comm. Doc. No. 35, 73rd Cong., 2d Sess. 10 (1937). The district court's declaration that only Fresno and Madera Counties are within the watershed of the San Joaquin River, 3R. 941, 1014, is contrary to these well known facts. As a finding of fact it is contrary to the evidence. As a conclusion of law it depends on a totally unsupported use of the word "watershed". 25 Ops. Cal. Atty. Gen. 8, 19 (1955).

ects or to divest the United States of its rights as a senior appropriator of water to use the water as provided by federal law. 1 Wiel, Water Rights in the Western States 325-27 (3d ed. 1911).

Thus, neither federal nor state law entitles Fresno to demand preferential treatment either as to quantity or price of municipal water service from the project. Whether, in what amounts, and at what rates Fresno or any other municipal water users can be furnished water without impairing the irrigation efficiency and financial integrity of the project, are within the delegated discretion of the Secretary of the Interior.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE UNITED STATES HAS NOT CONSENTED TO BE SUED AND THAT, WITH THE DISMISSAL OF THE UNITED STATES, THE DISTRICTS SHOULD NOT BE SUBJECT TO THE INJUNCTION.

The district court joined the United States as a defendant on the basis of § 208 of the Department of Justice Appropriations Act, 1953, 66 Stat. 560 (1952), 43 U.S.C. § 666. 142 F. Supp. at 85, 7R. 104; 1R. 336-38. In the district court judgment the injunction was imposed against all the defendants, including not only the United States and the federal officials in charge of the operation of Friant Dam, but also the districts under contract to accept delivery of water from Friant. 3R. 1020-21.

The Court of Appeals reversed the district court and ordered the United States dismissed, 293 F. 2d at 348, 7R. 376, still, however, leaving the districts subject to the injunction. Then, upon rehearing granted on the petition of the districts, the Court of

Appeals agreed with the districts that since they are under contractual obligation to the United States to accept delivery of water, the injunction places them in jeopardy of contempt for complying with their contractual obligations and for acts of the defendant officials over which they have no control, and held that the injunction should be modified so as not to be applicable to the districts. 307 F. 2d at 97, 7R. 401-02.

The City of Fresno contends that the Court of Appeals was in error both in dismissing the United States and in relieving of the districts from the injunction. Fresno Br. 116-37, 153-63.

The Court of Appeals based its conclusion that the United States had not consented to be sued in this action on the ground that in two respects this action does not qualify as one "for the adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. § 666: First, all claimants have not been joined, *Miller v. Jennings*, 243 F. 2d 157 (5th Cir. 1957); and second, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves. 293 F. 2d at 347, 7R. 374-75.

The City of Fresno makes no serious attempt to dispute that the type of action contemplated by § 666 is one in which all claimants from the particular source are joined and their rights established between themselves. Instead it argues that these requirements were satisfied.

On the question of joinder, the City asserts that all claimants were in effect joined because of the class

nature of the action. Although the City apparently concedes that claimants of appropriative and prescriptive rights cannot speak for other claimants of such rights, it cites a letter from the California Attorney General's Office as constituting an admission that the amount of appropriative and prescriptive claims is *de minimis*. The City reasons that such claims should, therefore, be disregarded in determining whether all claimants were joined. Fresno Br. 125-26.

Even assuming that the requirement of joining all claimants could be satisfied by joining less than all on this *de minimis* theory, the letter from the California Attorney General's Office concerned only appropriative and prescriptive rights to make *surface* diversions from the San Joaquin River. It did not concern claimed rights to river replenishment of underground water pumped from wells. There is nothing in the record to indicate the magnitude of the claimed appropriative and prescriptive rights to pump such underground water. They may very well be quite large. For example, as explained in the Statement of the Case herein, the uses of ground water by the City of Fresno itself are largely appropriative and prescriptive. Under California law, a city or public district may exercise overlying ground water rights only by use on land which it owns, and must rely on appropriative or prescriptive rights in furnishing water to its residents.

On the question whether the rights of all claimants were adjudicated between themselves, the City contends that this was done by the district court's judg-

ment. Such contention is in direct contradiction with the district court's own characterization of this action:

> "*This is not* a suit wherein the plaintiffs seek to establish for each of them their separate rights *inter sese* to a given quantity of water as between themselves or as against one another, but *it is* a suit to establish a *common right* to a *common source* of water." 142 F. Supp. at 36, 7R. 27-28. Emphasis in original.

> "The contention of the defendants as expressed by the Attorney General of the United States, that the interests of the plaintiffs and each of the users within the alluvial cone of the San Joaquin river are adverse to one another and that this cannot be a class action, is without foundation. The argument is to the effect that some plaintiffs take water directly from the river, others both from the river and from wells, and others from the underground only and that some rights may be appropriative or prescriptive, and hence all interests are adverse to one another. The argument confuses the method of taking water with the character of the right sought to be enforced, which is to prevent interference with the common source of supply to all of such uses. . . .

> "Where, as here, there is a common source of supply to the owners of all rights, and that common source is invaded or threatened, there is no reason in law or logic why any one or another nature of right cannot stand in judgment for all others, whether riparian, overlying, appropriative, or prescriptive, in a class action to protect that source of supply which is common to all of them. As to the common source and the common act of invasion of that source, their interests

> are identical—although as between themselves they may be different in amount, or different in quality, i.e., prescriptive, appropriative, or the like." 142 F. Supp. at 158-59, 7R. 225-26.

Consistently with the above characterization of the action, the district court did not even attempt to make a comprehensive adjudication of all rights to the particular source as between themselves, and a reading of the district court's findings, conclusions and judgment bears this out.

The City makes the plea, however, that if all necessary parties have not been joined, the defect be cured by allowing them to be joined at this time. Fresno Br. 128, 134. This would not solve the problem, however. It is not solely the absence of all the claimants which prevents this suit from qualifying as an adjudication of rights to the use of water under § 666. It is the further fact that, despite the change and expansion of the issues as the action unfolded, from the filing of the original complaint to the rendition of the district court judgment, the action was never conceived by anybody as being one for the comprehensive adjudication of all the rights involved. As the district court stated, the suit has always been an attempt to establish "a common right to a common source of water." 142 F. Supp. at 36, 7R. 27-28. To transform this suit into a true adjudication would mean literally starting all over again, with a new complaint having new allegations and a new prayer. There is no reason why, if this is the desire of the City of Fresno, it should not and cannot do so by filing a new action.

With the dismissal of the United States as a defendant, the Court of Appeals was clearly correct in relieving the districts from the injunction. As explained in Petitioners' Brief in *Delano-Earlimart, et al. v. Rank et al.*, October Term 1962, No. 115, the districts' only relationship to this case is as contractors *with the United States* for a water supply.[16] The fact that in that capacity they participated in this action in an effort to preserve San Joaquin River water at Friant to satisfy their needs under their contracts, does not answer the question as to the propriety of subjecting them to the injunction.

An injunction against the districts is unnecessary to protect the plaintiffs and could be very prejudicial to the districts. The apparent purpose of the injunction is to safeguard the plaintiffs' asserted rights by maintaining or simulating the natural flow of the San Joaquin River through the operation of Friant Dam or the construction of works in the river channel. Assuming this objective is proper, it can be readily accomplished by enjoining those who are in actual control of Friant Dam. Since the districts neither have nor claim any such control, there is no need to impose the injunction against them. On the other hand, the districts are required by their contracts to accept and pay for water delivered to them. If the injunction were applicable to them, the districts would

[16]The contention of the City of Fresno that the districts had contracts "with the defendant Bureau of Reclamation officials", Fresno Br. 162, is obviously erroneous and unsupported by either evidence or findings, as are the contentions that they aided, abetted, encouraged, approved or incited the defendant officials to perform illegal acts. Fresno Br. 159-163.

be faced with the dilemma whether to refuse to receive and pay for water delivered to them and be in violation of their contracts, or take the water in compliance with their contracts and be subject to contempt on the theory that they were aiding in the prohibited storage and diversion of San Joaquin River water.

CONCLUSIONS

For the reasons stated above, we urge that the judgment of the Court of Appeals in the respects attacked by the City of Fresno should be affirmed.

Dated, November 21, 1962.

Respectfully submitted,

DENVER C. PECKINPAH,
ADOLPH MOSKOVITZ,
Attorneys for Respondent, Madera Irrigation District.

MADDOX & ABERCROMBIE,
JAMES K. ABERCROMBIE,
Attorneys for Respondents, Delano-Earlimart, Exeter, Ivanhoe, Lindmore, Lindsay-Strathmore, Lower Tule River, Orange Cove, Porterville, Saucelito, Stone Corral, Terra Bella, and Tulare Irrigation Districts.

IRL DAVIS BRETT,
J. O. REAVIS,
Attorneys for Respondent, Southern San Joaquin Municipal Utility District.